



**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

**Civil
Case No. 14/319 SC/CIVL**

BETWEEN: Plantations Limited
Claimant

AND: Isaach Tariliu
Defendant

AND: Republic of Vanuatu
Third Party

Coram: *Justice Oliver.A.Saksak*

Counsel: *John Malcolm for the Claimant
Felix Laumae for the Defendant
Sammy Aron for the Third Party (Republic)*

Date of Hearing: *6th -7th June 2018*
Date of Judgment: *27th February 2019*

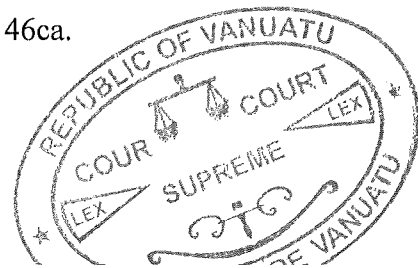
JUDGMENT

Introduction

1. This is a claim in trespass and for monetary damages, eviction, interest, and costs.

Background Facts

2. On 29th November 2009 a rural agricultural lease was registered in the names of Willie Bahao as lessee and Mary August as lessor. The registered title is 10/1322/001 (the First Lease). This lease was transferred to the Claimant on 25th January 2010. It covered an area of 639 Ha 79a 90ca.
3. About 2 years later on 5th September 2012 lease title 10/1431/001 (the Second Lease) was registered by the defendant. It covered an area of 2027 ha 88a 46ca.



4. The Second Lease encroached onto the First Lease by an area of 443 hectares. This was due to an error in the survey plan of the Second Lease.
5. In July 2013 the Director of Lands gave notice to the defendant. The defendant did not respond within 21 days. The Director rectified the plan to exclude the 443 hectares of the Second Lease to restore the original 639 hectares in the First Lease.

The Claim

6. The claimant claims the defendant is trespassing on their property and seeks an order for eviction, damages and costs.

Defendant's Case

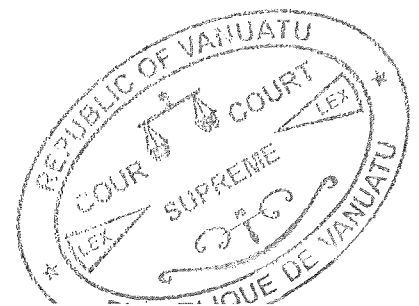
7. The defendant denies trespass. The defendant sought leave to join the Republic as Third Party and Counter-claims for cancellation of the First Lease on grounds of fraud and/or mistake, and for indemnity against the Republic.

Claimant's Response

8. The claimant and Third Party deny fraud and/or mistake and say the defendant is not entitled to any relief that he seeks in his counter-claims. They say the defendant has no standing to challenge the validity of the First Lease and further say the defendant's counter-claim is time-barred.

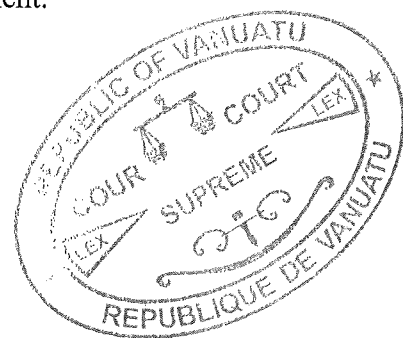
The Issues

9. I consider the following are the issues:
 - a) Is Lease 10/1322/001 (First Lease) valid or was it obtained by fraud and/or mistake?
 - b) Has the defendant got standing to challenge the validity of the First Lease?
 - c) Is the claimant entitled to damages?
 - d) Is the defendant entitled to indemnity against the Third Party?



Consideration of Issues

10. The issues are considered in light of the evidence presented and the submissions made by Counsel for the parties, in particular the claimant and the defendant. The Republic has not filed any written submissions despite numerous reminders by emails from the Court.
11. The first issue: Is Lease 10/1322/001 valid, or was it obtained by fraud or mistake? From the evidence of Mr Gambetta and Mr Jean Marc Pierre the First Lease was approved by the Minister on 30th October 2009 and duly registered at 16:00 hours on 24th November 2009. (See Annexures JMP4 and JMP5). The custom-owner of the land comprised in the First Lease was named as Mary August.
12. The defendant argued first that the First Lease was a bad lease because no certificate of negotiator was approved for its issuance.
13. The evidence of Mr Gambetta and Mr Jean Marc Pierre clearly show a certificate of registered negotiator issued by then Minister Harry Iauko on 5th August 2009 (See Annexure JMP1). The defendant challenged the authenticity of the certificate on the basis that it was too dark.
14. The fact that the copy of the certificate is dark proves nothing. The fact is that there was issued a certificate of registered negotiator issued which enabled the custom-owner to negotiate for the the grant of the lease. The custom landowner named on the certificate is Mary August. On 6th November 2009 the then Minister of Lands recommended or instructed for the registration of the lease enclosing-
- The executed lease document,
 - Letter from the customary lands unit of 3rd November 2009 confirming custom ownership,
 - Minutes of a chiefs meeting confirming ownership, and
 - Letters of support from the Shefa Provincial Government.



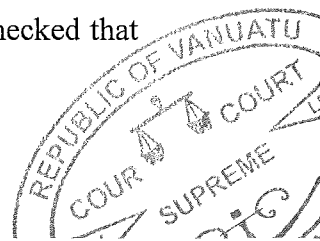
15. The defendant had no evidence of any challenge he made to the registration of the First Lease in 2009 or 2010. He only challenged that registration on the basis of a certificate that is black. That is not sufficient to show mistake or fraud.
16. The defendant produced evidence from Morara George. The witness was not available at the hearing for cross-examination. His statement was admitted into evidence but it bears no weight to the defendant's case. It contains hearsay evidence. It lacks details of how much money was allegedly paid to Willie Bahao by Mr Monvoisin. I reject Morara George's evidence.
17. I also reject Massing Tariliu's evidence. These are evidence that go to proof of customary ownership that should be properly given to the competent Court or land tribunal. His evidence does not help the defendant's case about mistake or fraud. It is not now open for this Court to determine customary ownership. The case of Peter Colmar.v. Rose Vanuatu Ltd CAC 13 of 2009 is clear authority on this point.
18. I accept the evidence by the claimant and by the witnesses giving evidence for the State. I reject the defendant's evidence. It falls short of showing any mistake and/or fraud on the part of the claimant or the State in registering the First Lease.

Findings

19. I find that the First Lease was validly registered. I find no mistake or fraud committed. I find the defendant has no standing to challenge the registration of the First Lease. I find also that the defendant has no standing to challenge the transfer of the First Lease and its registration in favour of the Claimant.
20. I have basically answered the first two issues in (a) and (b).

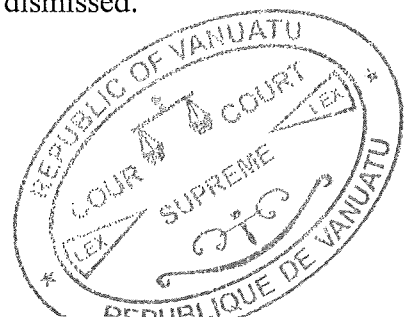
Further submissions

21. The defendant made further submissions that there were errors in the survey plan of the First Lease. He relied on the evidence of James Nwango. The survey plan of the First Lease was done by Jerry Moli on 10th September 2009. Mr Gambetta confirmed in his evidence there was no mistake in that plan. The surveyor General checked that



plan and approved it. The Court accepts this evidence. Jerry Moli at some point tried to say in a letter that he did not make the plan. But he did not depose to any sworn statement and he could not be available to give evidence orally and be cross-examined. What he said or told someone cannot be evidence.

22. Mr Nwango however was the surveyor who made a gross error in doing the survey plan for the Second Lease granted to the defendant. He did a plan that encroached onto the Claimant's lease by 443 hectares. For that error his evidence cannot be given any weight.
23. The defendant alleged the claimant was not a bonafide purchaser of the lease for value. This allegation flies in the face of the evidence which shows clearly the claimant paid VT 10,000,000 for the transfer of the First Lease to the Plantations Limited. In comparison to the defendant's lease 10/1431/001 with an area of 2494 ha 74 a 40ca there has been no consideration made except for a yearly rent of VT 10,000. The defendant's argument cannot be sustained and is rejected.
24. One final complaint of the defendant was that the Director did not give him the opportunity of being heard before he rectified the survey plan in respect of his lease. The evidence is to the contrary. The power of the Director to correct errors in a survey plan is provided under sections 11 and 99 of the Land Leases Act.
25. The evidence was that the Director wrote to the defendant on 24th July 2013 (Annexure JMP9) giving the defendant 21 days to respond. The defendant's evidence was that he wrote his responses and objections in his letter which is dated 12th June 2013. This letter predates that of the Director's of 24th July 2013. He was not asked about whether the date is an error on his part. Presumably the correct date would have been 12th August 2013. Even then the 21 days requirement by law had lapsed. The defendant could have then appealed the Director's rectification but did not. He filed his proceeding to challenge the validity of the First Lease on the basis of fraud and mistake instead. The process he used was flawed and is misconceived. The defendant's counter-claim is time-barred by 2 ½ years. It must be dismissed.

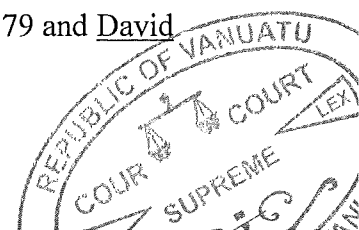


26. The defendant claimed he hand delivered his letter on 12th June 2013 at 3 pm. The date predates the letter of Director of 24th July 2013. If he insists the date he gave is correct he has not disclosed to whom he gave the letter to. If it did not get his attention to know what the Director was intending to do would seriously affect his lease, it is hard to imagine why he did not insist on getting an urgent appointment with the Director on the same date he claims he hand delivered his response and objections. No, he just walked away leaving it for another 3 months to October. That omission or lack of necessary action on his part reflects badly on the defendant's attitude and his handling of the case. He cannot now use that omission or in-action on his part to claim for indemnity against the Republic. The fourth issue in (d) is therefore answered in the negative and the relief sought is rejected and declined by the Court.

27. I accept Mr Malcolm's submission that the claimant registered his transfer of lease first in time and that it is trite law that his title is good in law and remains indefeasible unless the defendant can successfully challenge its validity on the basis of mistake or fraud. The case of Peter Bouchard .v. Director of Lands CAC 5 of 2003 supports this principle. Sections 14 and 27 of the Land Leases Act recognise this right of Plantations Limited.

28. Mr Laumae made submissions that the First Lease was issued and registered by mistake. He relied on the cases of Nafalak Teufi Limited.v. Kalsakau (2005) VUCA 15 (CAC 7 of 2004) and Jone Rogara and Others.v. Noel Takau and others CAC 25 of 2005.

29. The principles established in these cases are clear. In this case the onus is on the defendant as counter-claimant to establish not only that a mistake was made by the Claimant or the Director of Lands but also he must satisfy the Court that the mistake had caused the registration of the First Lease. I have analysed the evidence and have come to the conclusion that the defendant as counter-claimant has not discharged that duty on the balance of probabilities. I have found there to be no evidence of mistake at all. As such he has not satisfied the Court that the First Lease was registered or issued by mistake and/or fraud. The case authorities therefore do not assist him, they are against his case. The cases of Manepora'a.v. Aonima [2011] SBHC 79 and David



Securities Pty Ltd.v. Commonwealth Bank of Australia [1992] 1089 ALR 57 provide good definitions of what fraud and mistake are but they do not assist the defendant's case.

Damages claim

30. The defendant claimed some monetary damages in his amended defence. However it appears these were abandoned in the Further Amended Defence and Counter-claim dated 12th September 2017. The Court will not consider those damages claim for lack of pleadings and lack of evidence in support.

31. I now turn to consider the claimant's claims. Mr Malcolm submitted the claimant is entitled to a removal order, compensation for loss of 467 hectares of land from 4th September 2012, (a period of 6 years), removal of buildings and other structures, compensation for loss of all timber or trees cut and section 17g rights of occupation.

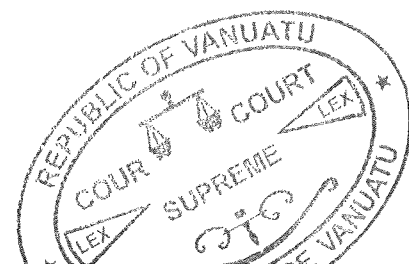
32. There is insufficient evidence or at all by the claimant showing he was and is in actual possession of 467 hectares from 4th September 2012. And there is no evidence showing the loss of timber and trees the claimant planted on the 467 hectares and which were cut by the defendant. These claims are declined and are dismissed.

33. The claimant is however entitled to an order of removal or eviction, and for costs on an indemnity basis against the defendant.

Conclusions

34. The claims of the claimant are partly successful. Judgment is entered in favour of the claimant for an eviction and costs on an indemnity basis.

35. The counter-claims of the defendant fail in their entirety and are dismissed.



ORDERS

36. The defendant by himself his families, relatives friends, agents and representatives remove themselves, their houses, buildings and other structures they have erected on the 467 hectares of the Plantations Limited Lease 10/1322/001 within a period of 30 days from the date hereof (by 26th March 2019). Failure to comply with this order will result in the claimant applying for an Enforcement Warrant to the Master.
37. The defendant shall pay the claimant's costs of and incidental to this action on an indemnity basis, to be taxed if not agreed.

DATED at Port Vila this 27th day of February 2019

BY THE COURT


OLIVER.A.SAKSAK

Judge

